

STATEMENT OF PROFESSOR ROBERT A. SEDLER
TO THE MICHIGAN LEGISLATURE (Senate Economic Development Committee)
IN REGARD TO A PROPOSED COMPACT BETWEEN THE STATE OF MICHIGAN
AND THE GOVERNMENT OF CANADA TO BUILD A BRIDGE ACROSS THE
DETROIT RIVER BETWEEN DETROIT, MICHIGAN AND WINDSOR, CANADA

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Introduction

My name is Robert A. Sedler. I am a Distinguished Professor of Law at Wayne State University, where I have taught since 1977. My field is constitutional law. I have published extensively in my field, including a monograph on American constitutional law for the International Encyclopedia of Laws. I have recently published a law review article on the Constitution and the American Federal System in the Wayne Law Review.

I have been retained by the Detroit International Bridge Company (DIBC) to analyze questions of constitutional law and constitutional policy that I see presented by a proposed compact between the State of Michigan and the Government of Canada providing for the construction, operation, and maintenance bridge across the Detroit River between Detroit, Michigan and Windsor, Canada. The views that I express here, of course, are my own.

It is my respectful submission that the Michigan Legislature should not enact any legislation that would authorize a compact between the State of Michigan and the Government of Canada providing for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor. My submission is based on the following reasons.

1. A compact between the State of Michigan and the Government of Canada providing for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor would be unconstitutional as preempted by federal law. First and most importantly, such a compact would be unconstitutional as preempted by federal law. By the Special Act of 1921, Congress provided for a single franchise for a named company for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor. The Special Act has never been amended by Congress to authorize a second franchise for the construction, operation and maintenance of another bridge over this international river crossing. Thus, a Michigan law providing for the construction, operation, and maintenance of another bridge over this international river crossing would be in direct conflict with the Special Act of 1921, and so would be unconstitutional as being preempted by federal law.

Furthermore, under Art. I, sec. 10 of the Constitution, an American state may not enter into a compact with a foreign nation unless it gets the specific approval of Congress for that compact. The only way then that the State of Michigan could enter into a compact with Canada for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor is if it obtained the specific approval of Congress for this compact. In this connection, it should be noted that a 1972 law, the International Bridges Act, authorizing an American state to apply for Presidential permit to construct a bridge between that state and Canada, does not apply to authorize a Presidential permit for a second bridge across the Detroit River between Detroit and Windsor. This is because the legislative history of the 1972 Act, as set forth in the Report of the House Committee on Foreign Affairs to accompany the Bill in the House, makes it indisputably clear that the 1972 Act is solely a process Act, intended to change only the process for the approval of a new bridge between the United States and Canada from an Act of Congress to a Presidential permit instead of by an Act of Congress. The Act clearly was not intended to amend existing laws dealing with bridges between the United States and Canada, and or to adversely affect rights established by those laws. Indeed, if the 1972 Act were interpreted as authorizing a Presidential permit for a new bridge across the Detroit River between Detroit and Windsor, the 1972 Act would operate as an impermissible implied repeal of the single franchise for a named company provision of the 1921 Act, and would put the United States in violation of its treaty obligations to Canada. So, if Michigan wants to enter into a compact with Canada to construct a new bridge across the Detroit River between Detroit and Windsor, it must obtain the specific approval of Congress for that compact and for a second bridge over that international river crossing.

2. The Government of Canada cannot now enter into a compact with the State of Michigan for the construction, operation and maintenance of a second bridge across the Detroit River between Detroit and Windsor.

A second point to be emphasized, apart from the dispositive matter of federal preemption, is that at the present time the Government of Canada does not have the authority under Canadian law to enter into a compact with the State of Michigan for the construction, operation and maintenance of a second bridge across the Detroit River between Detroit and Windsor or to commit 550 million dollars to Michigan to support the project,

This is so for two reasons. First, at the present time there are parallel court decrees of the United States District Court for the Eastern District of Michigan and the Federal Court of Canada, arising out of litigation between DIBC and the Government of Canada, and these decrees may be interpreted to preclude the Government of Canada from entering into any compact with the State of Michigan to construct a bridge across the Detroit River from Detroit to Windsor. Second, the Parliament of Canada has never

repealed the Canadian Special Act of 1921, called the CTC Act, and under Canadian law as it now stands, there is only the provision for a single franchise for a named Canadian company, Canadian Transit Company (CTC), to construct, operate and maintain the bridge over the Detroit River between Detroit and Windsor on the Canadian side. Under the Canadian principle of parliamentary supremacy, the Government of Canada, which constitutes the executive branch under the Canadian Constitution, cannot take any action that is contrary to a law of the Parliament of Canada. Unless and until the Parliament of Canada authorizes a franchise for a second bridge over this international river crossing, the Government of Canada, represented by the Minister of Transport, does not have the authority under Canadian law to enter into a compact with the State of Michigan for the construction of a second bridge or to commit 550 million dollars to Michigan to support the project.

I will now develop both of these points more fully.

Presentation

I. A compact between the State of Michigan and the Government of Canada providing for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor would be unconstitutional as preempted by federal law.

A. A 1921 Special Act of Congress granted a single franchise to a named company, the predecessor of DIBC, to construct, operate and maintain a bridge across the Detroit River between Detroit and Windsor. Congress has never amended the Act to authorize a franchise for a second bridge across the same international river crossing. Any effort by the State of Michigan, without Congressional authorization to construct, operate and maintain a bridge over the same river crossing would be in direct conflict with the Special Act of 1921, and so would be unconstitutional as preempted by federal law.

The main and dispositive reason why the Michigan Legislature should not enact any legislation that would authorize a compact between the State of Michigan and the Government of Canada with for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor is that under the Constitution of the United States, the State of Michigan does not have the power to authorize such a bridge. Under the Constitution, only Congress, in the exercise of its power to regulate commerce with foreign nations, has the power to authorize a bridge over international waters between the United States and Canada.

In a Special Act of March 24, 1921, with subsequent amendments in 1924, 1925, and 1926, Congress granted the American Transit Company, the predecessor of

the Detroit International Bridge Company (hereinafter DIBC), the right to "construct, maintain and operate a bridge and approaches thereto across the Detroit River at a point suitable to the interests of navigation, within or near the city limits of Detroit, Wayne County, Michigan." The Special Act was enacted pursuant to the Act of March 23, 1906, which was designed to regulate the construction of bridges over navigable waters of the United States, and pursuant to the 1909 Boundary Waters Treaty between the United States and Great Britain, which at that time exercised dominion over Canada. The 1921 Special Act was conditioned on reciprocal legislation from the Government of the Dominion of Canada, and its approval by the British Crown, which was forthcoming. The reciprocal legislation created a Special Agreement of the kind anticipated by the Boundary Waters Treaty. Under both American and Canadian law, the reciprocal legislation has the status of a treaty, and neither nation can unilaterally repeal its legislation without violating its obligations under international law.

In enacting the Special Act of 1921, Congress made a policy decision to give a franchise to a named American private company, the predecessor of DIBC, to construct, operate and maintain a bridge across the Detroit River between Detroit and Windsor. The historical record shows that the reason Congress made this policy decision was because of the engineering challenges that were inherent at that time in designing and constructing a bridge of such size and load capacity. So, Congress and the Canadian Parliament enacted reciprocal laws, providing that the responsibility for constructing, operating and maintaining the bridge would be turned over to a named private company that would bear all the risks of construction and maintenance and could charge "non-discriminatory and reasonable tolls" for traffic over the bridge. Pursuant to the franchise established by the Special Act of 1921, the Ambassador Bridge was constructed and went into operation in 1929. It must be emphasized that the owners of the Ambassador Bridge provided all the funds for land acquisition, design, construction and fixturing of the Ambassador Bridge without any government support. The Ambassador Bridge, therefore, is a unique international crossing. It was established pursuant to a Special Act of Congress, under which the private owner of the bridge received a Congressionally-authorized franchise to construct, operate and maintain the bridge with its own funds, in return for which it was authorized to charge "non-discriminatory and reasonable" tolls for building and operating the bridge. In the 1921 Act, Congress expressly reserved the right to alter, amend or repeal this Act, but it has not done so. At the present time, therefore, the Ambassador Bridge remains as the only Congressionally-authorized bridge across the Detroit River between Detroit and Windsor.

The Ambassador Bridge is a part of the nation's critical infrastructure. The term, "critical infrastructure" is defined by federal law as "systems and assets, so vital to the United States that the incapacity or destruction of such systems would have a debilitating impact on national security." The Ambassador Bridge is a privately-owned part of this critical infrastructure. It is privately owned, because Congress has so provided in the Special Act of 1921, and as has been pointed out in a Report of the

U.S. Section of the North American Competitiveness Council, 85% of the United States critical infrastructure is owned or operated by the private sector.

Since the Ambassador Bridge was established pursuant to the 1921 Special Act of Congress under a single franchise for a named company, if the State of Michigan were to attempt to construct, operate, and maintain another bridge across the Detroit River between Detroit and Windsor to compete with the Ambassador Bridge, either on its own or pursuant to a compact with the Government of Canada, there would be a *direct conflict* between the action of the State of Michigan and the 1921 Special Act of Congress. Whenever there is a direct conflict between the action of an American state and a law of Congress, under the Supremacy Clause of Art. VI, sec. 2 of the Constitution, the action of the state is unconstitutional as preempted by federal law. See e.g., Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (where a federal law providing retirement benefits expressly stated that the benefits would not be subject to legal attachment, a state could not apply its marital property law to require that a share of the benefits go to the other spouse). Again, only Congress has the constitutional power to authorize the construction, operation and maintenance of a bridge over the Detroit River between Detroit and Windsor, and any effort by Michigan to construct a second bridge over the same international river crossing would be unconstitutional as preempted by federal law.

B. Michigan cannot enter into a compact with Canada for the construction, operation, and maintenance of a bridge across the Detroit River between Detroit and Windsor without obtaining specific Congressional approval for that compact.

Furthermore, under Art. I, sec. 10 of the Constitution, an American state may not enter into a compact with a foreign nation unless it gets the specific approval of Congress for that compact. The only way then that the State of Michigan could enter into a compact with Canada for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor is if it obtained the specific approval of Congress for this compact. In this connection, it should be noted that a 1972 law, the International Bridges Act, authorizing an American state to apply for Presidential permit to construct a bridge between that state and Canada, does not apply to authorize a Presidential permit for a second bridge across the Detroit River between Detroit and Windsor. This is because the legislative history of the 1972 Act, as set forth in the Report of the House Committee on Foreign Affairs to accompany the Bill in the House, makes it indisputably clear that the 1972 Act is solely a process Act, intended to change the process for the approval of a new bridge between the United States and Canada to authorize the approval of such a new bridge by Presidential permit instead of by an Act of Congress. The Act clearly was not intended to amend existing laws dealing with bridges between the United States and Canada, and or to adversely rights established by those laws. Indeed, if the 1972 Act were interpreted as authorizing a Presidential permit for a new bridge across the Detroit River between

Detroit and Windsor, the 1972 Act would operate as an implied repeal of the single franchise for a named company provision of the 1921 Act. To say the least, implied repeals are highly disfavored, and as the United States Supreme Court recently stated: "As we have emphasized, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." Hui v. Castanada, 130 Sup.Ct. 1845, 1853 (2010). Finally, since the reciprocal 1921 laws of Congress and the Canadian Parliament providing for a single franchise for a named company to construct, operate and maintain a bridge across the Detroit River between Detroit and Windsor, have the status of a treaty under both American and Canadian law, the 1972 Act would be construed as not affecting in any way the 1921 reciprocal legislation. The Supreme Court has long held that a federal law must be strictly construed to avoid any conflict with American treaty obligations and principles of international law. See McCulloch v. Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (federal labor relations law would not be construed as applying to a foreign flag vessel, even though the vessel was owned by an American company). So, if Michigan wants to enter into a compact with Canada to construct a new bridge across the Detroit River between Detroit and Windsor, it must obtain the specific approval of Congress for that compact. The legislation for a new bridge now pending before the Michigan legislature has no provision by which the State of Michigan would seek to obtain the specific approval of Congress for a compact with Canada respecting the construction, operation and maintenance of the proposed new bridge.

C. In summary, only Congress can authorize a franchise for a new bridge across the Detroit River between Detroit and Windsor, and Michigan is constitutionally prohibited from undertaking the construction of such a bridge without specific Congressional authorization. And if Michigan wishes to enter into a compact with Canada for the construction, operation and maintenance of such a bridge, Michigan must first submit that compact to Congress for its approval.

For these reasons, it is my studied opinion that if the State of Michigan were to attempt to construct and operate another bridge across the Detroit River between Detroit and Windsor to compete with the Ambassador Bridge, either on its own, or pursuant to a compact with Canada, the action of the State of Michigan would be held unconstitutional as not authorized by Congress and so preempted by federal law.

D. The Governor Cannot Construct a Bridge

It should also be noted that the Governor of Michigan does not have the power under the Michigan Constitution to by-pass the Legislature and order the construction of a new bridge on his own. The Governor's action in issuing an executive order providing for the construction, operation and maintenance of a new bridge would be a flagrant violation of the separation of powers provision of Art. 3, sec. 2 of the Michigan Constitution. That provision provides that: "The powers of government are divided into

three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers belonging to another branch except as expressly provided in this constitution." The separation of powers doctrine, embodied in Art. 3, sec. 2, has been called "the most fundamental doctrine in American political and constitutional thought."

Under Art. IV, sec. 1 of the Michigan Constitution, "The legislative power of the State of Michigan is vested in a senate and house of representatives." The legislative power is the power to enact laws. The enactment of a law by the Michigan Legislature establishes the public policy of the State of Michigan and represents a determination by the State of Michigan that a particular governmental action is necessary to advance the public interest. This being so, only the Michigan Legislature can decide that a new bridge across the Detroit River between Detroit and Windsor is necessary to advance the public interest. The construction, maintenance, and operation of such a bridge creates enormous legal and financial consequences for the State of Michigan, and only the Michigan Legislature can commit the State of Michigan to undertake an action that creates those enormous legal and financial consequences for the State.

If the Governor wants the State of Michigan to construct, operate and maintain a bridge over the Detroit River between Detroit and Windsor, he must first obtain the enactment of a law of the Michigan Legislature. There is no other way.

But again, as I hope I have demonstrated, a law of the Michigan Legislature providing for the construction, operation and maintenance of another bridge across the Detroit River between Detroit and Windsor to compete with the Ambassador Bridge, would be held unconstitutional as not authorized by Congress and so preempted by federal law.

II. The Government of Canada cannot now enter into a compact with the State of Michigan for the construction, operation and maintenance of a second bridge across the Detroit River between Detroit and Windsor.

A second point to be noted, apart from the dispositive matter of federal preemption, is that at the present time the Government of Canada does not have the authority under Canadian law to enter into a compact with the State of Michigan for the construction, operation, and maintenance of a second bridge across the Detroit River between Detroit and Windsor or to commit 550 million dollars to Michigan to support the project. This is so for two reasons.

A. First, there are parallel American and Canadian court decrees that may be interpreted to preclude the Government of Canada from entering into a compact with the State of Michigan to construct a bridge across the Detroit River from Detroit to Windsor

At the present time there are parallel court decrees of the United States District Court for the Eastern District of Michigan and the Federal Court of Canada, arising out of litigation between DIBC and the Government of Canada, and these decrees may be interpreted to preclude the Government of Canada from entering into a compact with the State of Michigan to construct, operate and maintain a bridge across the Detroit River from Detroit to Windsor.

The litigation giving rise to the parallel court decrees resulted from an effort of the Government of Canada to confiscate without compensation the Canadian half of the Ambassador Bridge in 1979, when DIBC acquired ownership of both the American and Canadian sides of the Ambassador Bridge. DIBC resisted this effort by filing lawsuits both in the Federal Court of Canada and in the United States District Court for the Eastern District of Michigan.. The litigation dragged on for many years. In 1990, the litigating parties, specifically DIBC and the Government of Canada, entered into a Settlement Agreement and a follow-up agreement in 1992 that settled all ownership and control issues concerning the Ambassador Bridge. The Settlement Agreement specifically provided that "Canada and DIBC have the mutual desire to make the DIBC facilities at Windsor a model facility border crossing between Canada and the United States." As a result of the Settlement Agreement, the Canadian action was dismissed with prejudice pursuant to the Settlement Agreement on November 29, 1990, and the action in the United States District Court was dismissed with prejudice pursuant to the Settlement Agreement on April 6, 1992. The Court Orders dismissing the actions with prejudice pursuant to the Settlement Agreement are decisions on the merits of the case, and the terms of the Settlement Agreement are enforceable against both parties to the lawsuits.

In 1992, immediately after the dismissal of the American action, Canada and the United States executed the North American Free Trade Agreement (NAFTA), which prohibits discrimination against both nations and their citizens, and so would prohibit Canada from confiscating the Canadian half of the Ambassador Bridge.

In my opinion, there is a substantial legal question arising out of the settlement agreement and resultant court orders. If the Government of Canada maintains that there is a need for increased bridge capacity across the Detroit River between Detroit and Windsor, in my opinion, it would be a reasonable interpretation of the Settlement Agreement to conclude that Canada is bound by this provision to first consider the twinning of the Ambassador Bridge with a second span (which, as I am sure you are aware, DIBC has offered to construct at its own expense), and more importantly for present purposes, that Canada is precluded by the Settlement Agreement from establishing a competing bridge across the Detroit River between Detroit and Windsor within two miles of the Ambassador Bridge.

The Government of Canada recognizes that there is a substantial legal question arising out of the 1990 Settlement Agreement as to whether Canada may

legally enter into a compact with the State of Michigan for the construction, operation and maintenance of another bridge across the Detroit River between Detroit and Windsor. This is why the Government of Canada has instituted a proceeding against DIBC and its Canadian affiliate in the Ontario Superior Court of Justice, in which the Government of Canada states that DIBC and its Canadian affiliate have asserted that the Settlement Agreements require the Government of Canada to maintain the Ambassador Bridge as a "model facility border crossing" across the Detroit River between Detroit and Windsor, so that the Government of Canada is precluded from participating in the implementation of a new crossing that will compete with the Ambassador Bridge." The Government of Canada goes on to say that "interpretation of the Settlement Agreements is of significant importance to the continued participation of the Government of Canada in the DRIC process."

The case was filed in November, 2009, and has not yet advanced beyond the preliminary stages. Unless and until the Canadian court holds that the Government of Canada is not precluded by the Settlement Agreement from participating in the establishment of a competing bridge, Canada does not have the authority to participate in what it has called the proposed DRIC project. What this means is that at the present time the Government of Canada cannot enter into any compact with the State of Michigan with respect to the proposed DRIC project. It cannot advance 550 million dollars to Michigan to support the project. It cannot do anything.

Moreover, even if the Canadian courts were to interpret the Canadian decree as authorizing such participation, there would still be a substantial legal question as to whether the United States District Court would interpret its decree as authorizing such participation. The decrees of the American and Canadian courts are independent of each other, and each court would be interpreting its own decree. So, regardless of what the Canadian courts would do, the United States District Court could reasonably interpret the 1990 Settlement Agreement as precluding the Government of Canada from entering into a compact with the State of Michigan for the construction of a competitive bridge across the Detroit River between Detroit and Windsor.

B. Second, the Parliament of Canada has not authorized a franchise for the construction, operation and maintenance of a second bridge across the Detroit River between Detroit and Windsor.

The Parliament of Canada has never repealed the Canadian Special Act of 1921, called the CTC Act, and under Canadian law as it now stands, there is only the provision for a single franchise for a named Canadian company, Canadian Transit Company (CTC), to construct, operate and maintain the bridge over the Detroit River between Detroit and Windsor on the Canadian side. Under the Canadian principle of parliamentary supremacy, the Government of Canada, which constitutes the executive branch under the Canadian Constitution, cannot take any action that is contrary to a law of the Parliament of Canada. Only the Parliament of Canada then can authorize a second bridge over the same international river crossing covered by the CTC Act, and

Parliament has not done so. Unless and until the Parliament of Canada authorizes a second bridge over that international river crossing, the Government of Canada, represented by the Minister of Transport, does not have the authority under Canadian law to enter into a compact with the State of Michigan for the construction of a second bridge or to commit 550 million dollars to Michigan to support the project.

It should be noted in this regard that Parliament is unlikely to authorize a franchise for a second bridge over this international river crossing, since this would put Canada in violation of its treaty obligations to the United States, resulting from the fact that both nations have enacted reciprocal legislation providing a single franchise for a named company on both sides of the river to construct, operate and maintain a bridge over this international river crossing.

Finally, as long as we are talking about Canada, you should be aware that the Government of Canada has taken the position in a federal court lawsuit, in which it was represented by John Bursch, the current Solicitor-General of Michigan, that Canada enjoys sovereign immunity and cannot be sued either in the Canadian or American courts for any actions with respect to a bridge across the Detroit River between Detroit and Windsor. So, if the revenues from the proposed new bridge were insufficient to cover the costs of maintenance, Canada could refuse to make the required payments to the State of Michigan, and then claim that it was immune from suit by Michigan in either the Canadian or American courts to recover those payments.

Conclusion

In summary, for the reasons that I have set forth in this presentation, I would respectfully submit that the Michigan Legislature should not enact any law that would authorize a compact between the State of Michigan and the Government of Canada providing for the construction, operation and maintenance of a bridge across the Detroit River between Detroit and Windsor.

Thank you for your consideration of this presentation.